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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-10

DAVID MOOR, et al., *Petitioners,*

vs.

COUNTY OF ALAMEDA, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

Plaintiffs Rundle and Moor were injured during attempts by law enforcement officers to suppress a riot which occurred when a mob of some 2,000 persons attacked California Highway Patrol officers in Berkeley, California on May 15, 1969. (A.16; A.33) *Halvonik v. Reagan,* 457 F.2d 311, 312 (9th Cir. 1972).

Plaintiffs first filed timely claims against the County under state law[1] on August 20, 1969. (A.6; A.23) Plaintiffs filed the instant action in the District

[1]California Government Code §§905, 911.2.

Court on February 12, 1970. (A.5; A.22) In August, 1970 plaintiff Rundle filed a parallel action in the State Court. (RRA74)[2]

The District Court and State Court actions were instituted against the County, the County Sheriff, and four deputies. Plaintiffs alleged that deputy Riche shot them and that the other defendants conspired to declare "otherwise lawful assembly and speech as riotous in order to allow defendants . . . to indiscriminately shoot at and otherwise molest said persons." (A.5-10; A.22-27)

In March, 1970, Defendant County answered the District Court actions, *denying* that the Court had jurisdiction over it (A.11; A.28) and asserting that plaintiffs had failed to state a claim against it. (A.14; A.31) All defendants denied plaintiffs' charging allegations and asserted certain affirmative defenses. (A.11-18; A.28-35)

In August and September, 1970, defendant County moved to dismiss in both cases for lack of subject matter jurisdiction. (A.1-2) After extensive briefing and argument, these motions were granted by the District Court (A.2-3) and affirmed by the Ninth Circuit Court of Appeal (Appendix A to petition for Writ of Certiorari).

[2]References to the Record on Appeal in Moor will be designated MRA, and references to the Rundle record will be RRA.

SUMMARY OF ARGUMENT

The question before the Court is whether a federal court without jurisdiction over a state subdivision can "acquire" jurisdiction by the back door, utilizing state law causes of action either through 42 U.S.C. §1988[3] or by the doctrine of pendent jurisdiction.

Plaintiffs do not contest in this appeal the holding of *Monroe v. Pape*, 365 U.S. 167 (1961) that public entities may not be sued under 42 U.S.C. §1983.[4] Instead, plaintiffs ask the Court to expand federal jurisdiction by allowing the District Court to hear state law causes of action against the County.

Firstly plaintiffs attempt to avoid the holding of *Monroe* by proposing incorporation of state law remedies into the 1871 Civil Rights Act[5] by means of Section 1988. However, Congress has said that public entities *may not* be held under that Act for violations by their employees. To defeat the limitation in that Act by reference to some other state law not so limited would be to amend the statute in a manner inconsistent with the intent of Congress and the language of the Act.

Section 1988 allows the Court to look to state damage remedies *not inconsistent* with the 1871 Act. It does not permit the Court to obtain *original jurisdic-*

[3]Originally Section 3 of the Civil Rights Act of 1866, 14 Stat. 27, reenacted in the Act of May 31, 1970, 16 Stat. 144. Hereafter Section 1988.

[4]Act of April 20, 1871, c. 22, §1, 17 Stat. 13. Hereafter Section 1983.

[5]42 U.S.C. §§1983-86. Hereafter 1871 Act.

tion over a new party on a state law cause of action, which is inconsistent with the congressional limitation in the Act. Further, plaintiffs already have perfectly adequate remedies under both federal and state law.

Secondly, plaintiffs attempt to avoid the holding of *Monroe* by asking the Court to do what Congress has declined to do—create a law conferring jurisdiction over a new party on a new state law cause of action by expansion of the doctrine of pendent jurisdiction.

Although the doctrine of separation of powers has perhaps suffered somewhat in recent years, it is still one of the cornerstones of our government. For this Court to expand the jurisdiction of the district Court to new parties, in the absence of congressional authority, would be to ignore this basic tenet.

Congress has not conferred jurisdiction over the County in this case, and the claim of expediency offered is not sufficient to justify such a major shift in the division of power between Congress and the courts. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), certainly does not compel such a result.

While one can readily appreciate the reasoning in *Gibbs* that once the District Court has the parties before it, all related issues should be decided, it is a very different thing to force additional parties to litigate additional state law claims in federal court where there is no basis whatsoever for federal jurisdiction over that party. This is particularly true when the party being forced into the federal forum is a subdivision of a state and a defendant.

The question is not what would be most expedient, but what power Congress has given to the federal courts. Plaintiffs' end-justifies-the-means analysis would be suspect in any setting, but is particularly inappropriate where basic questions of separation of powers and federal court jurisdiction are involved.

Finally, plaintiff Moor asserts that a division of the state can be a citizen of itself for purposes of diversity jurisdiction. Regardless of the status of "counties" in other states, the Ninth Circuit has several times examined the question and determined that *California counties* are so closely tied to the state as not to be "citizens" of the state.

Plaintiffs' arguments should be addressed to Congress—not to this Court.

ARGUMENT

I

THE COURT BELOW PROPERLY HELD THAT SECTION 1983 MAY NOT BE UTILIZED TO CIRCUMVENT THE CLEAR INTENT OF CONGRESS THAT PUBLIC ENTITIES MAY NOT BE SUED UNDER THE 1871 CIVIL RIGHTS ACT.

In *Monroe v. Pape,* 365 U.S. 167, 191 (1961), this Court held that Congress clearly intended that public entities not be included within the scope of the 1871 Act.

Plaintiffs say they do not take issue with *Monroe* and further state that they are not attempting to expand the scope of the 1871 Act, but only the juris-

diction of the Court to hear a state law cause of action against the County. Plaintiffs attempt to reach this result by arguing that Section 1988 incorporates within it the entire body of applicable state law and at the same time qualifies as an "Act of Congress" providing for equal rights of citizens, or the protection of civil rights, within the meaning of 28 U.S.C. §1343(3)(4).

At the outset, plaintiffs' attempt to expand jurisdiction of the District Court through Section 1988 is subject to four fatal flaws.

(1) Section 1988 only allows the District Court to use additional damage remedies as to a party over which it already has jurisdiction. The District Court does not have jurisdiction over the County in this case and correctly held that it could not obtain bootstrap jurisdiction through Section 1988.

(2) Section 1988 only allows use of state law remedies consistent with the Act of 1871. Vicarious liability suits against public entities for alleged civil rights violations by their employees are not consistent with the intent and language of the 1871 Act.

(3) Section 1988 only allows use of state law remedies when the laws of the United States do not furnish suitable remedies. In this case, plaintiffs unquestionably have an adequate remedy under federal law.

(4) California law does not provide a *direct* cause of action against public entities for their employees' alleged civil rights violations.

A. Federal Jurisdiction Cannot be Obtained Solely Through Section 1988

First, the language of Section 1988 clearly limits its scope to cases where jurisdiction is independently present when it states:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter . . . shall be . . . enforced [by federal laws, but where federal laws do not furnish suitable remedies the] . . . statutes of the State wherein the court *having jurisdiction* of such civil or criminal cause is held . . . shall be extended to and govern the said courts in the trial and disposition of the cause. . . . [Emphasis added.]

This is not language conferring original jurisdiction on the District Court as to new causes of action against a party not otherwise before the Court. It is language conferring on the District Court the right to supplement federal procedural remedies with state law procedure in cases where the Court already has acquired its basic jurisdiction over the parties. As held by the Court below:

> Finally, we note that section 1988 has not been construed as having created a separate basis for prosecuting claims under the Civil Rights Act, but rather as pertaining to the "forms of process and the scope of remedy." *Pierre v. Jordan,* 333 F.2d 951, 958 (9th Cir. 1964) *cert. denied* 379 U.S. 974 (1965), *rehearing denied,* 380 U.S. 927 (1965). *Cf. Johnson v. New York State Ed. Dept.,* 319 F.Supp. 271, 276 (E.D.N.Y. 1970). Thus, it provides for the adoption of state law

> to cure remedial deficiencies in the federal act, but does not create any right of action in and of itself. [Appendix A to Petition for Writ of Certiorari at Page 7]

This Court has itself previously intimated that Section 1988 was designed to cover remedial deficiencies in the 1871 Act. In *Sullivan v. Little Hunting Park,* 396 U.S. 229, 240 (1969) it was held that:

> This means, as we read Section 1988, that both federal and state rules *on damages* may be utilized. . . .

The same result was also reached in *Post v. Payton,* 323 F.Supp. 799, 802-03 (E.D.N.Y. 1971), where the Court held:

> Section 1988 authorizes in civil rights cases resort to the remedies and procedures of the common law where those of federal law are inadequate. This section does not create an independent cause of action. See In re Stupp, 23 F.Cas. 296 (No. 13,563) (C.C. S.D.N.Y. 1875); Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Operators of United States and Canada, 70 F.Supp. 1008 (S.D.Calif.C.D. 1947), affirmed per curiam, 165 F.2d 216 (9th Cir. 1948), cert. denied, 334 U.S. 812, 68 S.Ct. 1018, 92 L. Ed. 1743 (1948).

B. State Law Causes of Action Inconsistent with the 1871 Act Cannot be Incorporated Through Section 1988

Second, as held by the Ninth Circuit below, in *Ries v. Lynskey,* 452 F.2d 172 (7th Cir. 1971), in *Wilcher v. Gain,* 311 F. Supp. 754, 755 (N.D.Cal. 1970), and most recently in *Brown v. Ames,* 346 F. Supp. 1173,

1176 (Minn. 1972), the back-door approach to public entity Civil Rights Act liability suggested by plaintiffs is inconsistent with the express limitation in the Act to persons and therefore impermissible.

There can be no doubt that Congress intended to exclude public entities from the operation of the 1871 Act.

In *Monroe v. Pape,* 365 U.S. 167, 191 (1961) Justice Douglas, speaking for the Court, stated:

> The response of Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the *Act of April 20, 1871* was so antagonistic that we cannot believe that the word "person" was used in this particular *Act* to include them. [Emphasis added.]

The Court's analysis is further confirmed by the remarks of Representative Burchard prior to passage of the Act that:

> The General Government cannot punish the State, but the officer who violates his official constitutional duty can be punished under Federal law. What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violations by the State can only be consummated through the officers by whom it acts.

And as noted by the Court in *Monroe* at 190:

Mr. Poland, speaking about the Sherman proposal to make municipalities liable, said:

> "We informed the Conferees on the part of the Senate that the House had taken a stand on that

> subject and would not recede from it; that that section imposing liabilities upon towns and counties must go out or we should fail to agree."

This Court's holding in *Monroe v. Pape*, 365 U.S. 167 (1961) has been criticized on the ground that one of the reasons Congress excluded public entities from operation of the Act is that the power of Congress to do so was considered doubtful, and that the entities were at that time all immune. Plaintiffs here attempt to show that, if the 1871 Congress were somehow transported to the twentieth century, they might have passed a different law. This is not the point. As held in *Ries v. Lynskey*, 452 F.2d 172, 175 (7th Cir. 1971):

> The test here seems to us relatively simple. It is not whether the Congress in 1871 would have included a municipality within the definition of "person" if at the time municipalities generally had not had immunity under the common law of states but rather the test is what Congress meant to do at that time irrespective of the reasons leading to that action. What Congress meant to do, it seems clear from the exposition in *Monroe*, was to legislate that "person" did not include a municipality. As reflected by other portions of the *Carter* opinion the development of the common law calls into play the power of courts to reflect changing philosophies and concepts governing human conduct. A statute, however, in the absence of an integrated flexibility freezes the meaning of the legislative body as of the time of passage. Changes therein should be accomplished by the legislature. Interpretation, but not the rewriting of statutes, is the province of the courts.

Statutory construction should not be the handmaiden of legislative amendment.

This Court also reached the same result in *Monroe v. Pape*, 365 U.S. 167 (1961), when it refused to consider policy arguments that the law should now be changed. Indeed, the futility of second-guessing the reasons for the expressed legislative intent by referring to isolated remarks of individual members of Congress can be seen in Justice Frankfurter's dissent at 365 U.S. 225-37, 248-50.

Conceptually, whether considered as an expansion of Section 1983, or as a new right brought into the 1871 Act by incorporation of state law through Section 1988, the difficulty remains. Congress has said Section 1988 cannot be used to incorporate state law inconsistent with the Act, and at the same time has made it clear that the scope of the Act excludes public entities. Section 1988 cannot, therefore, be used to achieve a result contrary to the limitation in the Act and allow suit against public entities for their employees' alleged violations of Section 1983.*

Since *Monroe* was decided, Congress has several times enacted major and comprehensive civil rights

*Plaintiffs at one point claimed the County had waived its objection to the district court's subject matter jurisdiction but abandoned that position before the Court of Appeals. (Appellants' Opening Brief to the Ninth Circuit Court of Appeals—blue brief at 3). Here, the only jurisdictional issues go to the subject matter jurisdiction of the district court, and in any event there clearly has not been a waiver. *See, e.g., American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1957); *Kriser v. Duran*, 386 F.2d 179, 181 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042; *Martens v. Winder*, 341 F.2d 197 (9th Cir. 1965); *Resnik v. LaPaz Guest Ranch*, 289 F.2d 816 (9th Cir. 1961).

legislation. If Congress had wanted to make public entities liable under the 1871 Act, it would have said so. Having left a consistent and clearly expressed intent to limit the Act dating from 1871, the Court should not expand the Act by judicial interpretation.

As held in *Brown v. Ames*, 346 F. Supp. 1173, 1175 (Minn. 1972):

> It does not lie with this court to hold that Congress should have determined that it had constitutional power or should have adopted some other policy. Since it didn't, this court will not "correct" Congressional action—particularly in the face of a United States Supreme Court decision—and will not treat the law as though Congress had either been mistaken in its prerogative or unwise in its determination not to include municipalities. The *Monroe* doctrine has been on the books for nearly 11 years now, and Congress, aware of the decision, has not seen fit to amend the law. If Congress believes it ought to amend the law—and this court would agree that there may well be wisdom behind the policy to make municipalities liable—then it may do so, or at least provide liability where under State law a municipality has no immunity from suit if timely notice provisions are complied with.

C. Section 1988 May Only Be Utilized Where Remedies Under Federal Law Are Inadequate.

Third, Section 1988 was not designed, and should not be used, for large-scale incorporation of state law tort causes of action. As noted by Justice Harlan in his dissenting opinion in *Jones v. Alfred H. Mayer*

Co., 392 U.S. 409, 460 (1968), Senator Trumbull stated in reference to the 1866 Act:

> If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the state courts. . . .

In this case plaintiffs not only have adequate state law remedies,[7] but have taken advantage of these remedies by filing claims under state law.

Section 1988 is expressly limited to cases where the laws of the United States are "deficient in the provisions necessary to furnish suitable remedies."

Plaintiffs attempt to avoid this limitation by claiming that if they were to obtain a judgment against the individual defendants, they would not be able to collect. Plaintiffs, however, have failed to offer any facts as evidence to support their assertion *as to the defendants in this case* for the reason that they are unable to do so. In fact, the contrary is true. Should a judgment be rendered against the individual defendants in this case, it will be readily collectible by plaintiffs through California Government Code §825 or by the officers' insurance.

Government Code §825 provides:

> If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring

[7] *See, e.g.*, Cal. Govt. Code §§810, et al.

within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages. (Added Stats. 1963, c. 1681, p. 3270, §1.)

As alleged by plaintiffs in their brief to this Court the County is conducting the defense of the employees in this case. Under Section 825 the County is thus obligated to pay any compensatory damage judgment for plaintiffs. Further, in answers to interrogatories

filed August 7, 1970, defendant Madigan has informed plaintiffs that he has two policies of insurance and a bond covering his acts of misfeasance in office totaling more than $500,000.[8] Plaintiffs' assertion that the individual defendants are judgment-proof is totally without factual foundation in this case.

D. California Does Not Provide a Direct Action Against Public Entities for Alleged Civil Rights Violations by Its Employees

Fourth, plaintiffs' assertion that California law provides a direct right of action against the County for Section 1983 violations by its employees is disputed. No case has held that such a right of action exists, and the legislative history seems to indicate that it was considered and rejected. Although the California Law Revision Commission recommended consideration of enacting such a law,[9] the Legislature did not do so. What the Legislature did do was reject all public entity liability except that specifically provided in the Tort Claims Act.[10]

The legislative committee comment to Government Code §815 provides in part:

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[8]Plaintiffs, of course, have the burden of proof on sustaining jurisdiction of the district court. *U.S. ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84, 88 (3d Cir. 1969) *cert. denied*, 396 U.S. 1046 (1970). They have totally failed to meet that burden here, and the Court should not even consider their argument that the individual officers are judgment-proof. However, if the Court does choose to consider this point, it should at least be aware of the true facts, although not a part of the record on appeal.

[9]A Study Relating to Sovereign Immunity, 5 Cal. Law Revision Commission Reports, Recommendations and Studies, 455 (1963).

[10]Cal. Govt. Code §§810, et al.

> This section abolishes all comon law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution, e.g., inverse condemnation. In the absence of a constitutional requirement, public entities may be held liable only if a statute (not including a charter provision, ordinance or regulation) is found declaring them to be liable . . . [T]he practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts. The use of the word "tort" has been avoided, however, to prevent the imposition of liability by the courts by reclassifying the act causing the injury.

The Legislature then enacted Government Code §825 instead of providing for direct entity liability in federal civil rights cases. Section 825 has the advantage of providing for the employees' defense and payment of judgments against them while still focusing the spotlight on the employees who were involved and retaining the entity's rights against those employees.

A further advantage of the Section 825 approach is that any direct action against the entity would be subject to all the defenses in the Tort Claims Act, although the action against the employee under Section 1983 might not. Cal. Govt. Code §§815, 818, 818.2, 818.4, 818.8, 820.2, 820.4, 821.2, 821.6, 822.2, 844.6, 845.2, 845.4, 845.6, 845.8, and 846 (See attached Appendix). A Van Alstyne, *California Government Tort Liability*, §7.8 at 291-92 (1964). *See, Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted sub nom.* 404 U.S. 1014 (1972).

The legislative committee comment to Section 815 makes it clear that the immunity provisions will inure to the entity regardless of the statutory basis of liability:

> In the following portions of this division, there also are many sections granting public entities and public employees broad immunities from liability. In general, the statutes imposing liability are cumulative in nature, i.e., if liability cannot be established under the requirements of one section, liability will nevertheless exist if liability can be established under the provisions of another section. On the other hand, under subdivision (b) of this section, the immunity provisions will as a general rule prevail over all sections imposing liability. Where the sections imposing liability or granting an immunity do not fall into this general pattern, the sections themselves make this clear.
>
> Subdivision (b) also makes it clear that the sections imposing liability are subject to the ordinary defenses, such as contributory negligence and assumption of the risk, that are available in tort litigation between private persons.

Although, to a large degree, there is overlap between a tort action under California law and a Section 1983 action, the basis of liability is quite different. They should be kept separate, if for no other reason than to avoid the confusing and contradictory jury instructions which would necessarily result.

In short, California does not provide a direct vicarious liability action against its public entities,

and such an action would not be desirable. Instead, California has provided that the employing entity shall conduct the employee's defense and pay any judgments rendered against him for injuries caused in the scope of his employment.

Section 1988 is therefore not an appropriate vehicle in this case to expand the jurisdiction of the District Court in allowing a state law vicarious responsibility action against the County, premised on alleged Section 1983 violations by its employees.

E. Sound Policy Dictates That Federal Court Jurisdiction Should Not Be Expanded in this Case

In addition, other considerations mitigate against expansion of federal court jurisdiction by this court. As held in *Ries v. Lynskey,* 452 F.2d 172, 175 (7th Cir. 1971):

> We are not convinced that the policy arguments in any event are all one-sided. If a city is to be subject to §1983 liability when a police officer cannot be identified, as suggested by plaintiff, it is not unreasonable to think that the lure of a financially responsible defendant might tend to lessen the number of identifications. Also, the fact that the city might be liable under §1983 might well be accompanied by a lessening of the feeling of individual responsibility on the part of officers who would be aware that they were no longer the prime target in the event of violation of civil rights.

The present system would seem to be the best of both worlds. Because the public entity may not be made a formal party, attention is focused on the in-

dividual officers, which is where it belongs. Experience dictates that being made individual defendants in a law suit has a very sobering effect on police officers, but when only the city or county is named, the effect is not nearly so profound. Further, the trial of the case is simplified without the public entity by elimination of the special defenses which would be applicable under state law should the county be sued directly. Appendix to Petition for Writ of Certiorari at 28.

At the same time, the plaintiffs are assured that any judgments they obtain are collectable through either Government Code §825 or insurance, while the deterrent effect to individual officers is preserved through the sanction of punitive damages.

Plaintiffs' proposal is designed to foster a lack of uniformity among the circuits, and even among the district courts within a circuit. If adopted by this Court, a public entity would or would not be subject to suit in a civil rights action depending on the accident of the extent to which state law provides for public entity vicarious liability.

Further, there is grave doubt as to whether the Eleventh Amendment would permit suit against entities such as the County, and clearly such suit would not be permitted against states.[11] *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Ford Motor Co. v. Dept. of Treasury of State of Indiana*,

[11]Sovereign immunity can be waived for state court suits only. *Kennecott Copper Corp. v. State Tax Comm.*, 327 U.S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury of State of Indiana*, 323 U.S. 459, 465-66 (1945); *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 54 (1944).

323 U.S. 459, 465-66 (1945). Thus, even in the same district, inconsistent results would necessarily occur depending on whether the officer involved is an employee of the state or a city.

The jurisdiction of the federal courts was carefully limited constitutionally to only those cases or controversies which Congress authorized. U.S. Const. Art. III, §§1, 2. The federal district courts derive their power from Congress and not the Constitution, *Turner v. Bank of North America*, 4 Ball 8, 1 L. Ed. 721 (1800), and statutes conferring jurisdiction on the federal courts are strictly construed. *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

Finally, there has been in recent years a steady trend toward reduction of state sovereign immunity. Most such reductions have been through carefully balanced legislative plans. See e.g., California Tort Claims Act, California Government Code §§810, et al. For this Court to penalize those states which have partially reduced sovereign immunity by making them subject to suit in federal court is both unfair and might dissuade other states from reducing their sovereign immunity.

In view of the fact that plaintiffs here have adequate remedies in both federal and state courts under present law, this Court should not expand the jurisdiction of the district court in this case. The decision of the court below that plaintiffs may not expand the original jurisdiction of the district court by incorporation through Section 1988 of an inconsistent state law cause of action was correct and should be affirmed.

II.

THE COURT BELOW CORRECTLY DECLINED TO ASSUME JURISDICTION OVER THE COUNTY ON A "PENDENT" BASIS WHEN IT HAD NO INDEPENDENT BASIS OF JURISDICTION

As held in *Hubbard v. Ammerman,* 465 F.2d 1169, 1176 (5th Cir. 1972):

> It is elementary, of course, that United States District Courts have only such jurisdiction as conferred by an Act of Congress under Article III §2 of the Constitution.

It is equally well-established that:

> There is no presumption in favor of federal jurisdiction and the basis for such jurisdiction must be affirmatively demonstrated by the party invoking it. [Citations.] The obvious reason for such a rule is that the United States District Courts are courts of limited jurisdiction, "creatures of statute," possessing "only such jurisdiction as the statutes expressly confer, and this jurisdiction must always affirmatively appear." [Citations.] *U.S. ex rel. Gittlemacker v. County of Philadelphia,* 413 F.2d 84, 88 (3d Cir. 1969), *cert. denied,* 396 U. S. 1046 (1970).

A limited exception to that rule was found in *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), where it was held that although the federal question claim failed at the time of trial, the District Court could still hear a related pendent state law cause of action against the *same defendant.*

Gibbs did not hold, state, or imply that the district court would have original jurisdiction over an ad-

ditional party in the absence of a substantial federal claim against that party.

As stated by Professor Wright in Federal Courts 65 (2d ed. 1970):

> "Pendent jurisdiction," as the term has been used in this section, refers only to the joinder of state and federal claims, though this concept is not unrelated to the doctrine of ancillary jurisdiction applicable in diversity litigation. The pendent jurisdiction concept applies only where the same parties are involved on the state and federal claims. It does not permit bringing in an additional party to respond to a state claim on the ground that that claim is closely related to the federal claim against an existing party.

Accord, Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); *Williams v. United States*, 405 F.2d 951 (9th Cir. 1969); *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964); *Barrows v. Faulkner*, 327 F. Supp. 1190 (N.D. Okl. 1971); *Tucker v. Shaw*, 308 F. Supp. 1, 9-10 (E.D.N.Y. 1970); *Rosenthal & Rosenthal, Inc. v. Aetna Casualty & Surety Co.*, 259 F. Supp. 624, 630-31 (S.D.N.Y. 1966); *Gautreau v. Central Gulf S.S. Corp.*, 255 F. Supp. 615, 618 (E.D.La. 1966); *Hall v. Pacific Maritime Ass'n*, 281 F. Supp. 54, 61 (N.D.Cal. 1968); and *Ellicott Machine Corp. v. Wiley Mfg. Co.*, 297 F. Supp. 1044, 1046 (Md. 1969).

Plaintiffs here principally rely upon *Hatridge v. Aetna Casualty Surety Co.*, 415 F.2d 809 (8th Cir. 1969) and *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971).

In *Astor-Honor,* the Court decided the case on the basis that the disputed claim came within 29 U.S.C. §1338(b), holding at pages 630-31:

> While we are thus inclined to the view that a federal court may in its discretion entertain a state claim against a party not named in the federal claim if the state claim meets the *Gibbs,* test, we are not required to decide that issue here.

The statements in the opinion pertaining to pendent jurisdiction are therefore dictum, and the case is not authority for plaintiffs' position here.

In *Hatridge* the parties were already before the Court on a consolidated claim, and the only question was the jurisdictional amount on a claim removed from the state court. First Aetna obtained judgment that its policy did not cover the driver of a bus that overturned injuring Bryans and Hatridge. Next Mrs. Hatridge filed suit in state court for $9,999.99 for loss of consortium. This action was removed to the District Court and Aetna cross-complained against Mrs. Hatridge and the driver. Aetna also filed a declaratory relief action in the District Court against the Hatridges and the driver. The District Court consolidated the actions by consent of the parties and then held for Aetna by summary judgment on the declaratory relief action, refused to remand and dismissed Mrs. Hatridge's case with prejudice. 415 F.2d at 811.

The Court held that jurisdiction of the District Court was properly invoked on the declaratory relief

action, and that the summary judgment was correct. 415 F.2d at 812.

As to Mrs. Hatridge's claim, the Court held that despite the $9,999.99 prayer, the consortium claim could not be separated under state law from the underlying injury claim and that therefore federal court jurisdiction was properly invoked. 415 F.2d at 816.

Finally, as an alternate ground, the Court noted that the District Court had jurisdiction over all of the parties on the declaratory relief action and could accordingly under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) retain jurisdiction of the state claim against the same parties. Specifically, the Court held at p. 816:

> . . . we have here in Aetna's suit a claim appropriately described as a federal one; an asserted state claim in Mrs. Hatridge's suit; subject matter jurisdiction of the federal claim in the federal court; "a common nucleus of operative fact" for both; and claims which in character are such that they would rightfully be expected to be tried in one judicial proceeding.

Further, the Court in *Hatridge* was primarily concerned with preventing an obvious attempt to forum-shop—a consideration not present here.

Even so, the result reached in *Hatridge* has not been without criticism. As noted in 3A Moore's Federal Practice (Supp.) ¶18.07 (1-2) n.28, the Court "strained for jurisdiction." In *An Over-Extension of the Doctrine of Pendent Jurisdiction: Hatridge v. Aetna Casualty and Surety Company*, 24 Sw.L.J. 537, 542 (1970), another commentator stated:

> The desire for judicial economy and the prevention of forum-shopping is a beneficial quest. However, it must be determined whether these objectives are important enough to alter significantly accepted requirements for entrance to the federal courts. It would appear that federal judges are placed in a confusing position, for they are given the discretionary power to grant pendent jurisdiction in an effort to promote judicial economy, but at the same time are required to adhere to strict congressional requirements for entrance to the federal courts. Using a highly questionable application of precedent, the court in *Hatridge* has seemingly betrayed the federal requisites and left the gates to federal courts unguarded in an apparent effort to create an economical judicial system.

While one can readily appreciate the concern of the Court in *Gibbs*, it is respectfully submitted that the Court should move slowly in expanding the jurisdiction of the district courts.

As one of the few checks on the federal judiciary, our system of government provides that Congress shall define the jurisdiction of the district courts. Article III, §§1, 2; *see*, e.g., *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Chisholm v. Georgia*, 2 Ball 419; *Hubbard v. Ammerman*, 465 F.2d 1169 (5th Cir. 1972). As held in *Healy v. Ratta*, 292 U.S. 263, 270 (1934):

> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to

> the judiciary sections of the Constitution. See Kline v. Burke Constr. Co., 260 U.S. 226, 233, 234, 67 L.ed. 226, 231, 232, 43 S.Ct. 79, 24 A.L.R. 1077. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. See Matthews v. Rodgers, supra (284 U.S. 525, 76 L.ed. 451, 52 S.Ct. 217); compare Elgin v. Marshall, 106 U.S. 578, 27 L.ed. 249, 1 S.Ct. 484.

See also, *Baltimore Contractors v. Bodinger,* 348 U.S. 176, 181 (1955); *Kentucky v. Powers,* 201 U.S. 1, 36 (1906).

Although the interests of expediency and judicial economy are important considerations, it is submitted that they do not justify major expansions of district court jurisdiction *by this court.* If Congress wants to expand the jurisdiction of the district courts to hear related state law claims against parties not otherwise before the court, it may do so.

Furthermore, there are excellent reasons for declining to further expand federal court jurisdiction. As argued in M. Shackman, *The New Pendent Jurisdiction of the Federal Courts,* 20 Stan. L. Rev. 262, 265 (1968):

> The broad standard of pendent jurisdiction announced in *Gibbs,* however, is undesirable because it will place many cases in the federal courts that would otherwise be decided in state courts. The primary objection to reducing the role of

state courts in this area is that state courts have a surer footing on questions of state law than do federal courts. It is true, of course, that *Erie Railroad Company v. Thompkins* has required federal courts to decide state-law questions. But the fact that federal courts now decide such matters does not detract from the fact that state courts are better equipped to do so.

One may object that the desirability of having state courts decide state questions is matched by the desirability of having federal courts decide federal questions. But such an argument ignores the congressional policy of entrusting state courts with concurrent jurisdiction over most federal claims. In addition, channeling more federal questions through the state courts will tend to improve the quality of their adjudication of federal-law defenses in state cases where there is no alternative federal jurisdiction as well as in those cases in which there is concurrent jurisdiction.

There are other good reasons for avoiding federal-court determinations of state law. When a state court makes an error in interpreting federal law it can be corrected by review in the United States Supreme Court, but when a federal court makes an error in interpreting state law there is no state-court review of the federal decision. Similarly, when state courts show a pattern of incompetency or discrimination toward certain federal claims Congress can grant federal courts exclusive jurisdiction of the federal claim and any state claims that may be involved with it. State legislatures, of course, have no similar remedy when federal courts show such a pattern toward state law.

Plaintiffs here have perfectly adequate remedies under state law, and the state courts can hear the Section 1983-85 causes of action. Rather than a judicial expansion of the jurisdiction of the federal courts to state law causes of action, it makes more sense and is equally efficient to hear the entire case in the state courts where jurisdiction already exists. Many issues under the 1871 Act causes of action are decided by state law already[12], and plaintiffs are certainly not in a position to argue that California courts are unfair or incapable of hearing the issues.

In the absence of congressional authority, the jurisdiction of the federal courts should not be expanded. Certainly, there is no compelling reason to do so here.

III

EVEN IF THE COURT BELOW HAD THE POWER TO HEAR THE STATE LAW CAUSES OF ACTION AGAINST THE COUNTY, IT CORRECTLY DECLINED TO DO SO

Both the District Court and Ninth Circuit Court of Appeals had considerable reservation about the desirability of hearing state law claims against the County in this action. The Court of Appeals stated in this regard:

> Thus, the district court also felt as a purely discretionary matter the federal court was an inappropriate forum to hear these state claims. We

[12] *See, e.g., Ker v. California*, 374 U.S. 23, 34, 37 (1963) (lawfulness of arrest determined by state law); *Willis v. Reddin*, 418 F.2d 702 (9th Cir. 1969) (statute of limitations by state law); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislative immunity).

agree. [Appendix A to the Petition for Writ of Certiorari at 11.]

Since the District Court had already held it did not have the power to hear the state law claim against the County, its remarks on discretion were necessarily phrased in an advisory sense. Nevertheless, the District Court made it clear that were it free to do so, it would hold as a discretionary matter under the *Gibbs* standard that the state claims against the County should not be heard.

The only other case considering a similar situation, *Patrum v. City of Greensburg,* 419 F.2d 1300 (6th Cir. 1969) *cert. denied* 397 U.S. 990 (1970), reached the same result.

Civil rights suits against officers quelling a riot are complicated enough without interjecting unnecessary issues as to the entity. As held in *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966):

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. [Citations.]
>
> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

> Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. . . . Finally, there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, Fed Rule Civ Proc 42(b). If so, jurisdiction should ordinarily be refused.

As noted by the District Court Judge who will preside over the trial of this case:

> Moreover, on the issue of the court's *discretion* to adjudicate the pendent claim, there would still be substantial doubts as to whether the state claim should be heard. The present action will be tried to a jury, and with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case could become unduly complicated. Further, this court would be called upon to resolve difficult questions of California law upon which state court decisions are not legion. [Appendix A to Petition for Writ of Certiorari at 28.]

For example, plaintiffs here claim that state law provides them a direct respondeat superior action against the County. No state or federal court has

ever decided that point. It should be left for the resolution by the courts of California.

On the other hand, there are no compelling reasons here to require the state law causes of action against the County to be heard in federal court. As the County is required to pay any judgment against its employees in this case as an insurer, and as the employees themselves have insurance, the plaintiffs cannot successfully claim that they need the County as a party to have a financially responsive defendant.

Thus, even if the District Court had the power to hear the state law claims against the County, it correctly declined to do so. The judgment should be affirmed.

IV.

DEFENDANT COUNTY IS NOT A "CITIZEN" FOR PURPOSES OF DIVERSITY JURISDICTION

Plaintiff Moor also alleges diversity as a ground for jurisdiction over the County. 28 U.S.C. Section 1332 requires complete diversity among *citizens* of different states.

It is undisputed that a state cannot be a citizen of itself for purposes of diversity jurisdiction. In view of the County's status as a subdivision of the state, it is equally difficult to conceive of how it could also be a "citizen" of itself.

The cases considering "citizenship" of public entities turn on a construction of the particular entity's relationship to the state itself. Where the entity is

simply an arm of the state, it is not a citizen. *DeLong Corp. v. Oregon State Hwy. Comm'n,* 343 F.2d 911 (9th Cir. 1965).

As was held in *O'Neill v. Early,* 208 F.2d 286, 289 (4th Cir. 1953):

> The fact that the state has authorized the defendant school board to sue and be sued is immaterial, since it has not consented to suit in the federal court. Kennecott Copper Corp. v. State Tax Commission, supra, 327 U.S. 573, 66 S.Ct. 745, 90 L.Ed. 862; Ford Motor Co. v. Department of Treasury of State of Indiana, supra, 323 U.S. 459, 465, 65 S.Ct. 347, 89 L.Ed. 389; Great Northern Life Ins. Co. v. Read, supra, 322 U.S. 47, 54, 64 S.Ct. 873, 88 L.Ed. 1121; Southern Ry. Co. v. Query, D.C., 21 F.2d 333, 344. Even if it had consented to be sued in the federal court, jurisdiction is lacking since no federal question is involved and there is no diversity of citizenship in a suit which, although nominally against state agencies and officers, is in reality a suit against a state. State Highway Commission v. Utah Construction Co., 278 U.S. 194, 199-200, 49 S.Ct. 104, 73 L.Ed. 262; State of North Dakota v. National Milling & Cereal Co., 8 Cir., 114 F.2d 777; Kansas City Southern Ry. Co. v. Morley, D.C., 88 F.Supp. 300.

See also, *DeLong Corp. v. Oregon Hwy. Comm'n,* 233 F.Supp. 7, 19 (Ore. 1964) aff'd, 343 F.2d 911, (9th Cir. 1965).

Cases dealing with "counties" and municipalities in other states are not determinative of the issue, since the question is the status of *California's counties.*

In *Miller v. County of Los Angeles,* 364 F.2d 500, 501 (9th Cir. 1966), *cert. denied,* 386 U.S. 990; *Miller v. County of Los Angeles,* 341 F.2d 964 (9th Cir. 1965) and in this case the Ninth Circuit held that counties *in California* are not "citizens" for purposes of diversity jurisdiction.

An analysis of the status of California's counties shows that the Court was undoubtedly correct.

Article II, Section 1 of the California Consitution provides in part:

> (a) The State is divided into counties which are legal subdivisions of the State.

In *County of Los Angeles v. Graves,* 210 Cal. 21, 25 (1930), it was held:

> The counties are mere governmental agencies of the state, and the property entrusted to their governmental management is public property, the proprietary interest in which belongs to the public. If there be a legal title in the county, it is a title held in trust for the whole public. In the absence of constitutional restrictions, the leglislature has full control of the property so held by the counties as agencies of the state. [Citation.]

In *County of Marin v. Superior Court,* 53 Cal. 2d 633 (1960), the California Supreme Court held at 638:

> By the same token *all* property under the care and control of a county is merely held in trust by the county for the people of the entire state. The county is merely a political subdivision of state government, exercising only the powers of the state, granted by the state, created for the pur-

pose of advancing "the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and expressly for the general administration of justice." [Citations.] The county holds all its property, therefore, not just highway easements, as agent of the state. [Citations.]

The cases above cited are unanimous in holding that, *as against the state,* the county has no ultimate interest in the property under its care. In *Reclamation District v. Superior Court, supra,* 171 Cal. 672, 680, for example, the state was allowed to take land that had been used by a county for a courthouse, jail, hall of records, etc., without compensation on the theory that "the county is a mere political agency of the state . . . it holds its property on behalf of the state . . . it has no private proprietary interest in such property as against the state."

As to third parties, however, a different situation exists in that the county stands in the place of the state to the extent that the powers of the state have been delegated to it. For instance, in *County of Sierra v. Butler,* 136 Cal. 547 [69 P. 418], the county was allowed to sue to enjoin the defendant from leaving his debris on the highway against the defendant's claim that the state was the proper party to bring the action as the highway was only held in trust for the state by the county. The court said that as against third parties the county was given the authority to represent the state, and the state was bound by the result of the suit. [Citations.]

It has also been universally held that counties are not "persons" for the purpose of confining jurisdiction on federal courts under Section 1343. *See, e.g. Monroe v. Pape,* 365 U.S. 167 (1961). For the same reasons a county is not a "person," it is not a "citizen." It was never the intent of the framers of the constitution or of the legislature to subvert the principle of state sovereignty to the extent of allowing state governments to be sued in federal court on matters of state law. In fact the contrary intent is clearly expressed in Article 11 and in Section 1332. In the case of private or municipal corporations a strong argument can be made that these are much closer to "citizens" than state government. In the case of California counties, that argument cannot be made. By Constitution, state statute and decision, California counties are an integral arm of the state and no more. As such, they cannot logically or reasonably be considered "citizens" of the state.

The case of *Merced Dredging Co. v. Merced County,* 67 F.Supp. 598 (S.D. Cal. 1946) cited by plaintiff is not contrary authority. In that case the Court made the totally unnecessary statement that the County was a citizen; however, there was no issue in the case involving diversity jurisdiction and the statement was pure dictum. The sole issue in that case was due process of law—a federal question.

Reference should also be made to *United States v. Certain Parcels of Land in Riverside County,* 67 F. Supp. 780, 801 n.16 (S.D. Cal. 1946) where the status

of California counties was carefully considered. There the Court held:

> The rule as to suits against the state applies to each of the counties as agencies of the State. [Citation.]
>
> A county is not a person in any sense; it is not a corporation. It cannot sue or be sued, except where specially permitted by statute, and such permission can be withdrawn or denied at any time the legislature may think proper. [Citation.]
>
> . . . The county government is a part of the state government, which is sovereign and the state government, neither in its general nor local capacity, can be sued by her creditors or made amenable to judicial process, except by her own consent. [Citation.]

Section 1332 must be strictly construed against federal jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Thomson v. Gaskill*, 315 U.S. 442 (1942); *Buell v. Sears, Roebuck and Co.*, 321 F.2d 468 (10th Cir. 1963). All doubts must be resolved against federal jurisdiction. *Healy v. Ratta*, 292 U.S. 263 (1934); *Ogden v. Cox*, 294 F.Supp. 810 (N.D. Ga. 1968).

CONCLUSION

Plaintiffs here seek a judicial expansion of the jurisdiction of the District Court to hear purported state law causes of action.

Such an expansion is both unauthorized by Congress and unnecessary, since plaintiffs already have adequate remedies in both state and federal courts. The judgment of the Court below should be affirmed.

Dated, Oakland, California,
December 19, 1972.

Respectfully submitted,
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(Appendix Follows)